STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2003B159**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA CLEMENTI,
Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
Respondent.

THIS MATTER came on for hearing on April 22 and August 3, 2004 before State Personnel Board Administrative Law Judge Mary S. McClatchey. Complainant appeared through counsel, William S. Finger, Esquire. Respondent appeared through Monica Ramunda, Assistant Attorney General and Jill M. M. Gallet, First Assistant Attorney General.

MATTER APPEALED

Complainant, Barbara Clementi ("Clementi" or "Complainant") appeals her layoff by Respondent, Department of Corrections ("DOC" or "Respondent"). For the reasons set forth below, Respondent's layoff of Complainant is rescinded.

PROCEDURAL HISTORY

At the outset of hearing on April 22, 2004, the parties submitted written Stipulations of Fact and Exhibits. The Administrative Law Judge ("ALJ") admitted the stipulated facts and exhibits into evidence. Complainant then moved for judgment as a matter of law solely on her claim that the layoff was contrary to the state layoff statute and Board rules governing layoff. The parties presented argument. The ALJ then granted Complainant's motion.

The hearing proceeded on Complainant's remaining claims, consisting of the following: 1. the layoff was discriminatory on the basis of national origin; 2. Respondent's offer of retention rights was in violation of Board rules governing retention rights and was retaliatory in violation of the Colorado Anti-Discrimination Act; and 3. Complainant was entitled to an award of attorney fees and costs. The matter was set over for a second day of evidentiary hearing on August 3, 2004.

On June 1, 2004, Complainant was reinstated to her position. She therefore received part of the relief sought. On June 17, 2004, Respondent moved to dismiss Complainant's appeal with prejudice on the basis of the reinstatement. Respondent also moved for summary judgment on

Complainant's request for attorney fees and costs. Lastly, Respondent moved for an award of attorney fees and costs against Complainant based on her continued prosecution of this matter after reinstatement. Complainant opposed the motion.

The ALJ granted the motion to dismiss Complainant's remaining substantive claims of discrimination, retaliation, and her challenge of retention rights, on grounds of mootness. The ALJ denied Respondent's motion for summary judgment on Complainant's request for attorney fees and costs, determining that genuine issues of material fact existed as to whether an award of attorney fees and costs was mandated by the statute.

Pursuant to Board Rule R-8-38(B), the ALJ set both parties' cross motions for attorney fees and costs for evidentiary hearing on August 3, 2004.

ISSUES

1. Whether Respondent's layoff of Complainant was arbitrary, capricious or contrary to rule or law;

2. Whether Complainant is entitled to an award of attorney fees and costs;

3. Whether Respondent is entitled to an award of attorney fees and costs.

APPLICABLE LAW

Layoff Statute

Section 24-50-124, C.R.S. ("the layoff statute") states:

"Reduction of employees. (1) When certified employees are separated from state service due to lack of work, lack of funds, or reorganization, they shall be separated or demoted according to procedures established by rule. Such procedure shall require that consideration be given to performance evaluations of the employees and seniority within the total state service. Such employees shall have retention rights throughout the principal department in which they are employed. . . ."

State Personnel Board Rules Governing Layoff ("Layoff Rules")

Chapter 12 of the State Personnel Board Rules contains the following definitions:

R-12-15. Laid Off. Involuntary non-disciplinary separation from the state personnel system and, if certified, placement on a reemployment list.

R-12-17. **Layoff. Process of involuntarily separating an employee due to abolishment of the position for lack of work, lack of funds**, reorganization, or

displacement by another employee exercising retention rights."

Chapter 7 of the State Personnel Board Rules governs layoffs. The Rules provide in pertinent part:

"**LAYOFF PRINCIPLES**

R-7-7. The only reasons for layoff are lack of funds, lack of work, or reorganization. **These rules apply to any reduction in force that results in the elimination of one or more positions regardless of the reason for the layoff** . . . [Emphasis added]

R-7-8. **Departments must consider seniority and performance in making layoff decisions**. Departments may consider other factors in addition to seniority and performance. [Emphasis added]

R-7-9. In making layoff and retention rights decisions, departments shall use time bands to determine seniority. Departments shall also develop a matrix calculation for ranking priorities within the time bands.

. . .

Determining Priorities for Layoff and Retention Rights

R-7-14. Time bands for each affected class are established for three-year periods based on seniority. The three-year period begins with the calendar yea4r in which the layoff notice is given and extends backward, e.g. notice issued in 2002 creates the most junior time band of 2000 – 2002. Employees in the most junior time band must be displaced before employees in more senior time bands.

R-7-15. **For purposes of layoff, seniority is the calendar year in which continuous state serve began** . . . ." [Emphasis added]

4 CCR 801 (2004)

FINDINGS OF FACT

1. On January 1, 1995, Clementi commenced state employment as a Correctional Officer I. She promoted to Sergeant, Correctional Officer II, then to Case Manager, Correctional Officer III.

2. On October 1, 2002, Clementi promoted again, to the position of Community Corrections Parole Officer, in the Division of Adult Parole and Community Corrections ("the Division"). This was a highly coveted position for Clementi.

3. At the time of layoff, Clementi worked in Pueblo, Colorado. At all times relevant, Clementi

has resided in Pueblo with her three children.

4. Clementi's position was in the broad-band class entitled, Parole and Community Corrections Officers ("PCCO class"). There are over seventy employees in the PCCO class in the Division.

5. Clementi's state service date is more senior than all other employees in the PCCO class in the first three time bands.

6. Clementi received a rating of Commendable for the period October 1, 2002 through March 31, 2003, from the Division.

Reduction in Funding for DOC; Development of Business Plans to Achieve Reduction in Force

7. In fiscal year 2004, the Legislature of the State of Colorado reduced its funding of DOC, requiring the agency to make budget reductions.

8. The Division was charged with reducing its budget by $1.4 million dollars.

9. DOC Executive Director Joe Ortiz held an executive staff meeting for all Division Directors to discuss the budget reduction process. At this meeting, he directed them to develop a business plan to implement the reduction in force ("RIF"), which had to: a) include a combination of cutting personal services and operating expenses, b) best serve public safety, and c) meet the unique needs of each Division.

10. Ortiz informed his Division Directors he would review each business plan and, upon his approval, his office would implement the RIF.

11. Ortiz did not direct his Division Directors to consider seniority in total state service or performance evaluations of the employees in developing their business plans for the RIF.

12. Ortiz did not direct his Division Directors to assure their business plans complied with the state layoff statute or Board layoff rules.

13. Ortiz did not direct DOC Human Resources Director Madline SaBell to review the business plans for compliance with state law and Board rules governing layoffs. She did not do so.

14. No one at DOC took action to assure that the layoff process was in compliance with the law. (Testimony of SaBell.)1

Miller's Business Plan for the Division

1 SaBell's HR office was in charge of assuring retention rights were implemented in accordance with State Personnel Board Rules. SaBell sought the assistance of the Colorado Department of Personnel and Administration ("DPA") in this process; DPA staff were very closely involved in the retention rights process. However, as stated above, Complainant's appeal of retention rights was dismissed as moot and is not before the Board.

15. Jeaneene Miller was the Director of the Division. She developed the following business plan for her Division, consisting of three components:

a) first abolish vacant positions;

b) next abolish positions held by probationary employees;

c) lastly, abolish positions encumbered by certified state employees, utilizing length of service in the Division as the sole criterion.

16. Miller failed to consider seniority within the total state service or performance evaluations of the employees in abolishing positions in the Division.

17. Miller considered solely the factor of service time in the Division in implementing the RIF. She was concerned about the employees' ability to carry excessively heavy caseloads following the RIF. Miller believed that public safety could be compromised by having PCCO officers with less experience in the position remain on duty. The Division was responsible for supervising 8000 offenders in the community.

18. Ortiz approved Miller's business plan for her Division. Ortiz's office implemented the layoff, using length of service in the Division as the only factor.

19. Applying State Personnel Board Rules R-7-8, R-7-9, R-7-14, and R-7-15 to the PCCO class, all employees in the first time band (with state service dates during the period 2001 – 2003) were required to be laid off first. This did not occur. Only seven employees out of a total of approximately twenty-one in the first time band were laid off.

20. Employees in the second time band were required to be laid off second. Only two employees out of a total of approximately thirty-five in the second time band were laid off.

21. Employees in the third time band were required to be laid off last. Two employees out of a total of approximately eighteen in the third time band were laid off, Clementi and another employee.

22. Only seventeen employees in the PCCO class, out of a total of over seventy, were laid off. Had Respondent implemented the layoff utilizing seniority in state service and performance as required by the layoff statute and Board layoff rules, Clementi would not have been laid off. In fact, Respondent would only have laid off employees in the first time band.

Layoff of Clementi; May 8, 2003 Meeting

23. On May 5, 2003, Ortiz sent the layoff notice to Clementi. The letter stated in part:

> "The purpose of this letter is to advise you that your position, No. 82341, . . . has been identified for abolishment effective close of business June 30, 2003, due to lack of funds.

> This letter satisfies State Personnel Board rules, which require at least a 45- day notice of the abolishment of your position.
>
> Effective, close of business on June 30, 2003, you will be laid off and your name will be placed on a/an COM PAR OFF [Community Parole Officer] reemployment list for a maximum of one (1) year unless you are reemployed in a position in your current class before the one-year period expires.
>
> You may file an appeal of this action under the Rules of the State Personnel Board. . . .
>
> You have three business days, from receipt of this notice, to inform the Office of Human Resources . . . if you wish to exercise your possible retention rights. . . ."

24. Ortiz knew that abolishment of positions was subject to the layoff rules in Chapter 7 of the State Personnel Board Rules, as his own letter cites his compliance with Board Rule R-7-12 (the 45-day notice provision) in notifying Clementi of the "abolishment" of her position.

25. Neither Ortiz nor any other DOC employee offered an explanation as to why the layoff notice sent to Clementi had to comport with Chapter 7 of the Board rules, but the actual layoff process did not.

26. SaBell and DOC's Director of Prisons made arrangements with Miller to assure that all Division employees laid off were ultimately offered retention rights to a position in a correctional facility.

27. On May 8, 2003, Miller scheduled a meeting with Clementi, Human Resources staffer Rick Thompkins, and Clementi's supervisor, Gary Albrecht. They delivered the May 5 layoff notice to Clementi at that meeting.

28. Clementi objected to her layoff on grounds of her seniority in state service in the PCCO class. She informed the others present that she had far more seniority in state service than others in her class, pointed out that she had nine years of state employment, and informed them that others in her class had just 15 months at DOC.

29. Miller and the others informed Clementi that her seniority would be taken into account in the retention rights process. They provided no explanation as to why seniority in state service had not been considered in the layoff process. Thompkins explained that he was responsible for implementing retention rights, and that as soon as the retention area was defined, if she sought to exercise retention rights, she would be provided them.

30. Miller informed Clementi that she and all other laid off members of her Division would be reinstated to their original jobs as soon as the Colorado Legislature re-instated funding for the Division.

31. On June 3, 2003, SaBell sent Clementi a Notice of Retention Rights. Clementi objected to the retention rights offer because she believed an encumbered position listed was located at Arkansas Valley Correctional Facility, outside a 50-mile radius of her position, rather than inside a 50-mile radius.

32. On June 13, 2003, SaBell issued a new retention rights letter to Clementi modifying the previous offer.

33. Clementi elected to accept the Encumbered Case Manager One position, Position No. 36036, at Centennial Correctional Facility, located in Canon City. Clementi declined an Encumbered Community Parole Officer position, Position No. 83031, located in Denver. Clementi noted on her Retention Rights Election form, "I think the process that has been utilized is illegal and not in compliance with personnel rules."

34. The position Clementi accepted in the Case Manager Series is in a lower class of jobs at DOC because the pay grade is lower than that of the PCCO class.

35. Clementi was paid the same rate in her new position after exercising retention rights.

Travel Costs Incurred Due to the Layoff

36. Clementi resided in Pueblo with her three children at the time of layoff. After accepting retention rights to the closest position offered, in Canyon City, she was forced to commute 50 miles to and from work each day in her personal vehicle. The commute was 500 miles per week.

37. Clementi held the position in Canyon City for eleven months, until her June 1, 2004 reinstatement to Position #82341 in Pueblo.

38. The statutory rate for mileage fees is $.28 per mile. After accounting for vacation and other days off from work, Clementi incurred a total of $3660.00 in travel costs from her commute, over an eleven-month period.

Respondent's Knowledge of the Law

39. All of Respondent's witnesses, including Miller, reviewed Chapter 7 of the State Personnel Rules governing layoff prior to the RIF at issue. They understood that Chapter 7 applied to layoffs and retention rights. They asserted their belief that Chapter 7 does not apply to "abolishment of positions" because the word "abolishment" does not appear in the rules. All of these witnesses were also familiar with Board Rule R-12-17, which defines "layoff" as the "process of involuntarily separating an employee due to **abolishment of the position** for lack of work, lack of funds . . . ." Their testimony on this issue is found not to be credible.

40. Respondents did not provide any explanation as to how they came to this novel conclusion. They did not seek legal counsel in order to assure they were compliant with the law.

41. Respondent's witnesses also asserted their belief that a state employee whose position is abolished and accepts retention rights to another position (even a position in a lower class, as in Clementi's case), has not been laid off; therefore, the layoff rules do not apply in such a situation. This testimony is also rejected as lacking credibility.

42. SaBell testified to holding the belief that Clementi was not laid off and that Chapter 7 of the Board's rules governing layoff and retention rights do not apply unless the employee fails to exercise retention rights.

43. SaBell's position is that no state law or Board rules applied to the May 2003 RIF. She testified, "There are no rules regarding abolishment of positions." SaBell was familiar with Board Rule R-12-17 defining layoff as the abolishment of positions. Her testimony on this issue also lacked credibility.

44. SaBell's job at DOC is to assure that all personnel actions comport with the law. When she assumed the position as HR Director at DOC, SaBell read the *Halverstadt v. DOC*[2] decision, because it was a published personnel case in which her employer was a party. In *Halverstadt*, DOC had correctly implemented the layoff using seniority and performance as the two factors; only the applicability of a retention rights rule was at issue. SaBell knew that *Halverstadt* was binding precedent on DOC, and that it stood for the proposition that "'retention' has a dual meaning addressing both the right to keep a position during a downsizing and also the right to 'bump' into a position after a previous position has been abolished."[3] (Testimony of SaBell.)

45. At hearing, Complainant's counsel asked SaBell, "So you understood that *Halverstadt* was telling the Department [of Corrections] that the rules promulgated by the personnel board applied both to the right to keep a position during downsizing and also the right to bump, correct?" SaBell's response was, "Correct."

46. Despite her knowledge of the law, SaBell took no action to assure that the May 2003 RIF comported with the law. When asked who at DOC reviewed the "legal correctness" of the May 2003 RIF, "to make sure it was done legally or correct," SaBell testified, "No one."

47. At hearing, SaBell provided no explanation as to how or why DOC decided it would ignore seniority in state service and performance in the layoff process. Ortiz, the ultimate decision maker, did not testify.

48. There is no evidence in the record regarding Respondent's decision-making process regarding its determination that the layoff statute and rules did not apply to the May 2003 RIF. No witness for Respondent explained how this decision was reached, who was involved in making the decision, what reasoning process was utilized, or who made the ultimate decision.

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2 911 P.2d 654 (Colo.App. 1995).
3 *Id*., 911 P.2d at 658.

49. Neither SaBell nor anyone at DOC sought the advice of legal counsel regarding the agency's decision to violate the state layoff statute and Board layoff rules by ignoring seniority in state service and performance in the layoff process.

50. Respondent made a deliberate decision to willfully disregard the law governing layoffs. It did so without obtaining a legal opinion in support of its decision.

Settlement[4]

51. On October 7, 2003, Complainant's counsel sent a settlement offer to Respondent. It requested reinstatement or transfer to a position in Parole and Community Corrections in the Pueblo office and attorney fees in the amount of $2500.00, in exchange for a full release of all claims and no admission of fault.

52. Respondent did not respond to the offer and made no counteroffer.

53. SaBell did not inform Miller of Clementi's offer of settlement.

Reinstatement to Position #82341

54. On April 29, 2004, Miller sent a certified letter to Clementi advising her that "on May 1, 2004, or as soon thereafter as possible, you will be returned to the Colorado Springs Office, in position #82341, Parole Officer I."

55. On May 12, 2004, Miller sent Clementi another certified letter, informing her, "This letter is to correct information in my letter of April 29, 2004 concerning your return to Adult Parole and Community Corrections effective May 1, 2004. In the letter of April 29, 2004 I stated you would be returned to the Colorado Springs office. You will be returned to the PUEBLO office, in position #82341, Community Parole Officer."

56. On June 1, 2004, Clementi was reinstated to her PCCO class position, #82341, in Pueblo.

57. Without Board action, Clementi will be precluded from using the eleven-month period as a Case Manager for purposes of promoting to certain other DOC positions in the future.

DISCUSSION

A. Burden of Proof

4 While offers of settlement are inadmissible as to the merits of this and any other action under C.R.E. 408, they are relevant to a determination of whether an award of attorney fees is appropriate. Board Rule R-8-38 is modeled after case law interpreting section 13-17-101 et seq., C.R.S. That statute sets forth several factors to consider in determining whether to award attorney fees and costs, including offers of settlement as related to the amount and conditions of the ultimate relief granted. Section 13-17-103(1)(h), C.R.S.

In this *de novo* disciplinary proceeding, Complainant has the burden to prove that her layoff was arbitrary, capricious, or contrary to rule or law. The Board may reverse Respondent's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

B. Respondent's layoff of Complainant was contrary to rule and law

Respondent violated the layoff statute by failing to consider seniority in total state service and performance evaluations in implementing the May 2003 RIF and in abolishing Clementi's position. Section 24-50-124, C.R.S.

R-12-17 defines "layoff" as the process of involuntarily separating an employee due to abolishment of the position for lack of funds. Respondent, through its May 2003 RIF, engaged in the process of involuntarily separating Clement by abolishing her position due to lack of funds; i.e., it laid her off. Rule R-7-7 states, "These rules apply to any reduction in force that results in the elimination of one or more positions regardless of the reason for the layoff." Therefore, the rules in Chapter 7 applied to the May 2003 RIF.

Respondent violated R-7-8, R-7-9, R-7-14, and R-7-15, by failing to use time bands to determine seniority based on total state service, and by failing to make layoff decisions based on use of those time bands. Respondent also violated these rules by failing to abolish positions in the most junior time band first.

Respondent's argument that the layoff rules do not apply to this layoff is specious. There is no explanation in the record as to why Ortiz and SaBell empowered their Division Directors to proceed with layoffs without any consideration given to the law governing RIF's.

C.R.S. section 24-50-124 governs layoffs in the State of Colorado:

> "**Reduction of employees**. (1) When certified employees are separated from state service due to lack of work, lack of funds, or reorganization, they **shall** be separated or demoted according to procedures established by rule. Such procedure **shall** require that consideration be given to performance evaluations of the employees and seniority within the total state service.
>
> Such employees shall have retention rights throughout the principal department in which they are employed . . . ." (Emphasis added.)

There is nothing ambiguous about this statute. There is no exemption for "abolition" of a position. Had the legislature intended to somehow exempt a particular type of separation from the dual mandates of seniority and performance factors, it would have done so in this statute.

Respondent further argues that state employees whose positions are abolished and who exercise retention rights to another position in the state personnel system without an interruption in

service are not "laid off." Therefore, it contends, section 24-50-124 and the layoff rules do not apply to employees such as Clementi, and agencies that abolish positions do so in a legal void.

This argument is contrary to the clear intent of section 24-50-124: to assure that all state agencies eliminating positions apply seniority and performance standards in that process. Layoff is the triggering event that precedes the offer of retention rights; it is not an occurrence that follows the retention rights process.

Respondent's interpretation of the law is inherently illogical and untenable. If Respondent's vision of the law governing layoff were the correct one, RIF's would be implemented in the following manner:

1. agency would send notices of abolishment of positions to any employees it saw fit, based on any criteria it chose, but not subject to section 24-50-124, C.R.S. and Chapter 7 Board rules;

2. agency would offer those employees retention rights;

3. employees who exercise retention rights would work in their new positions, many of which may be fifty or more miles from their homes (as in the case of Clementi), and, if less senior employees in their class had not had their positions abolished, the more senior employees would have no claim under section 24-50-124, C.R.S. or Board rules; and,

4. only those employees whose positions were abolished and who turned down retention rights would be deemed to have been "laid off," and suddenly section 24-50-124 and Board rules in Chapter 7 would apply to them. Somehow, the agency would then implement the "layoff" rules to these employees, using seniority and performance as factors.

This scenario is inherently absurd. It lacks any logic, occurring completely at random, depending upon which employees exercise retention rights. This random process is not that which the Legislature intended in enacting section 24-50-124. Further, at Step 4 above, as a practical matter, it is impossible to somehow apply seniority factors to employees who have already lost their jobs. At this point in the layoff process, the damage has been done. The employees' only recourse is to appeal the "layoff" to the Board, at a time when they have no income and are ill-equipped to litigate against an agency in possession of most of the relevant evidence concerning the layoff.

Were Respondent's circular argument to prevail, then all state employees challenging a layoff would have to waive retention rights in order to have standing to challenge the layoff as being in violation of section 24-50-124 and Board layoff rules. Such an outcome would be violative of the intent of the statute, which is that "such employees" [separated from state service via layoff] **shall** have retention rights." (Emphasis added.)

To force state employees to forego their statutorily mandated retention rights as a condition precedent to enforcing the first clause of the layoff statute, is contrary to law. Moreover, it is repugnant to basic fairness.

Lastly, were Respondent's argument to prevail, as indicated above, state agencies would be free to implement RIF's utilizing any criteria they see fit, or no criteria at all. No law would apply. This outcome is not what the General Assembly intended in enacting Section 24-50-124: it has made its policy decision - agencies **must** give due regard to seniority in state service prior to implementing RIF's. If the legislature determines that different policy considerations should be paramount, it will modify the layoff statute.

Notably, Respondent had the option of using the RIF as a tool for reorganizing its divisions. The layoff statute recognizes that state agencies are often forced by RIF's to reorganize. Board Rules governing reorganization simply require the posting of a reorganization plan prior to its implementation. Board Rule R-7-7(A). However, Respondent has neither argued nor presented evidence that the RIF at issue herein constituted a reorganization.

C. Respondent's Action was Arbitrary and Capricious

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

Respondent willfully disregarded the law governing layoffs in implementing its May 2003 RIF. This decision is, to this day, completely unexplained. Respondent refused to use reasonable diligence and care to procure such evidence as it was required by law to consider in exercising its discretion: it refused to comply with the layoff statute and rules by ignoring seniority in state service in implementing the RIF. Further, in making that decision to disregard seniority in state service in direct contradiction of the law, it failed to obtain legal advice regarding its decision. No reasonable agency director or human resources director would implement a layoff so clearly contrary to law, without seeking the advice of legal counsel to support that decision. DOC's action was arbitrary and capricious under all three prongs of the *Lawley* test.

D. An Award of Attorney Fees and Costs to Complainant is Mandated

Section 24-50-125.5, C.R.S. states,

> "Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose or the appeal of

such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee . . . or the department, agency, board or commission taking such personnel action **shall be liable** for any attorney fees and other costs incurred by the employee or agency against whom such appeal or personnel action was taken, including the cost of any transcript together with interest at the legal rate. . . ." (Emphasis added.)

State Personnel Board Rule R-8-38 implements this provision:

"Attorney fees and costs may be assessed, upon final resolution of a personnel action, against a party as follows:

1. If the personnel action is found to have been instituted frivolously. A frivolous personnel action shall be defined as an action or defense in which it is found that no rational argument based on the evidence or the law is presented.

2. If the personnel action is found to have been made in bad faith, was malicious, or was used as a means of harassment. Such a personnel action shall be defined as an action or defense in which it is found that the personnel action was pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth.

3. If the personnel action is found to have been groundless. A groundless personnel action shall be defined as an action or defense in which it is found that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense." Board Rule R-8-38(A), 4 CCR 801.

Complainant argues that Respondent's layoff in violation of Section 24-50-124, C.R.S. and Board rules was frivolous, groundless, and in bad faith. She relies principally on the following argument: SaBell acknowledges that she was familiar with *Halverstadt* at the time of Clementi's layoff. Respondent's entire defense in this case consists of its contention that the layoff rules apply only to retention rights, not to layoffs preceding implementation of retention rights. *Halverstadt* directly contradicts Respondent's argument. Therefore, with this knowledge of the law, Respondent's decision to bypass the layoff statute and rules constitutes willful disregard of the law, which is bad faith *per se* under *Mayberry v. Univ. of Colo. Health Sciences Center*, 737 P.2d 427, 430 (Colo.App. 1987). This ALJ agrees.

In *Mayberry*, the agency knew the Board rule and an appellate court decision interpreting the rule in a specific way. It decided to violate the rule and to ignore the court decision. The Court of Appeals held, "because willful disregard of the law is bad faith *per se*," attorney fees were mandated under section 24-50-125.5, C.R.S. *Id*., 737 P.2d at 430. This case is identical. SaBell was a seasoned HR director, familiar with the layoff statute and rules, and with *Halverstadt*. In

Halverstadt, DOC had implemented a RIF, correctly using seniority and performance as the two major factors. And, the court had made it clear that retention rights rules apply equally to abolishment of positions. Despite her knowledge of the law, she and other managers at DOC decided to implement the May 2003 RIF in violation of the layoff statute and rules. Their legal position on the matter was that no law governed the RIF. Despite the radical and novel nature of this position, no one at DOC obtained legal counsel to affirm this extraordinary course of action. This constitutes a deliberate disregard the law that is *per se* bad faith. *Mayberry*.

DOC's action was also frivolous under Board Rule R-8-38(A)(1). That rule provides that "a frivolous personnel action shall be defined as an action or defense in which it is found that no rational argument based on the evidence or the law is presented." Respondent, at the highest levels of management, made the decision to implement the May 2003 RIF in blatant violation of the layoff statute and rules. The individual who made that decision is presumptively Mr. Ortiz, as he approved the Divisions' business plans for the RIF. Respondent failed to call Mr. Ortiz as a witness, and SaBell provided no information as to how she or others at the agency reached their decision.

The record is devoid of any explanation as to who decided, how, and why Respondent deemed itself to be exempt from the law governing layoffs. By failing to illuminate anything about its decision-making process, and by admitting to not having obtained advice of counsel, Respondent has failed to demonstrate excusable neglect in failing to understand the law. *Mayberry*, 737 P.2d at 430. Respondent's extraordinary "interpretation" of the law, that no law governs the layoff of employees, in the face of the longstanding layoff statute, layoff rules providing the roadmap for RIF's, and in direct contradiction of the holding in *Halverstadt*, is unsupportable. Respondent has presented no rational argument based on the facts or the law supporting its action. Therefore, the action was frivolous under Board Rule R-8-38(A)(1).

DOC points out that the Court of Appeals overturned the award of attorney fees and costs in *Halverstadt*, and that therefore no award should be given here. However, the situation herein is dramatically different from that in *Halverstadt*. In that case, DOC obeyed the fundamental mandates of the layoff statute and rules in utilizing seniority in state service and performance as the two factors in the layoff process. The rule at issue, by its own express terms, applied only to retention rights, and there was no Board rule defining retention rights or layoff at that time. Therefore, DOC had a reasonable argument that the rule did not apply to the initial layoff process. By marked contrast here, DOC has decided, on its own and without consulting counsel, to ignore the entire statutory and regulatory framework that governs the layoff process in this State. DOC was not faced with a subtle question as to the applicability of one minor rule; to the contrary, DOC flagrantly bypassed the entire scheme put in place by the General Assembly and State Personnel Board. And, it did so without seeking advice of counsel.5

Respondent argues that Complainant should not be entitled to attorney fees and costs incurred after the date of reinstatement. However, at the time of reinstatement, Complainant had prevailed on her legal claim challenging the layoff. Section 24-50-125.5 mandates that if a

5 Significantly, Respondent makes no argument as to why it "got it right" in *Halverstadt* in using seniority in state service and performance in that RIF, but failed to do so here.

personnel action is found to have been instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the agency "shall" be liable for attorney fees and costs incurred in appealing the action. Under this statutory mandate, a prevailing party has a right to an evidentiary hearing on his or her request for attorney fees and costs.

Moreover, Complainant has requested two forms of relief from the outset of this appeal: reinstatement and attorney fees and costs. Board Rule R-8-38(B)(2) mandates, "If a party requests an award of attorney fees and costs, each party shall be given an opportunity to present evidence on the issue." Having prevailed on her appeal of the layoff, Complainant is entitled by statute and Board rule to an evidentiary hearing on her request for attorney fees and costs under the Board's enabling act.

It is well settled that attorney fees spent in litigating the attorney fee issue "should be included" in attorney fee awards. *Gurule v. Wilson*, 635 F.2d 782, 792 (10th Cir. 1980); *Mau v. E.P.H. Corp.*, 638 P.2d 777, 781 (Colo. 1982). Hence, Complainant is entitled to an award of attorney fees and costs incurred in litigating her appeal of the layoff imposed in bad faith and in litigating her right to an award of attorney fees and costs under the Board's enabling act. *Mau*.

Complainant is also entitled to be reimbursed for her travel costs incurred as a direct result of her wrongful layoff. But for the illegal layoff, Complainant would not have incurred $3660.00 in travel costs. She is entitled to relief that will make her whole.

An award of attorney fees and costs is particularly important in this case, as Complainant will be punished for appealing her illegal layoff in the event she is forced to pay the significant attorney fees incurred in this case. In *Mau*, *supra*, the Colorado Supreme Court noted the importance of the attorney fee provision in encouraging the private bar to enforce the provisions requiring landlord return of security deposits. *Mau*, 638 P.2d at 779. Similarly, the attorney fee provision of the State Personnel Systems Act serves the critical purpose of encouraging employees to appeal personnel actions taken in bad faith and in willful violation of clearly established legal principles, as has occurred herein. To deny Complainant an award of attorney fees will punish her for bringing this action, and hence, will deny her the make-whole relief to which she is entitled. *Lanes v. O'Brien*, 746 P.2d 1366, 1373 (Colo.App. 1987); *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984.

E. Respondent is not entitled to an award of attorney fees and costs

Respondent requests an award of attorney fees and costs for having to defend against Complainant's continued litigation after reinstatement and her request for fees and costs. Respondent argues that Complainant has been "stubbornly litigious" in pursuing this matter following reinstatement. As the record above demonstrates, however, it is Respondent that has been stubbornly litigious in defending a groundless decision it failed to explain or justify in any manner at hearing.

Complainant has proceeded in good faith throughout this case. Early in this case, she

made an offer of settlement for nothing more than reinstatement and her reasonable attorney fees. The fact she prevailed on her appeal of the layoff based on stipulated facts and exhibits illustrates the strength of her case. Pursuant to the Board enabling act and controlling case law, it was appropriate for Complainant to seek an award of attorney fees and costs following a ruling in her favor on the merits of the layoff decision.

Respondent's request for fees and costs is denied.

CONCLUSIONS OF LAW

1. Respondent's layoff of Complainant was arbitrary and capricious and contrary to rule and law;

2. Complainant is entitled to an award of attorney fees and costs;

3. Respondent is not entitled to an award of attorney fees and costs.

ORDER

Respondent's action is rescinded. Respondent is ordered to make Complainant's reinstatement to her PCCO class position #82341 retroactive to July 1, 2003, in order that she may utilize that service for future promotion and other personnel relate purposes. Complainant's motion for attorney fees and costs is granted. Respondent shall pay Complainant's attorney fees and costs incurred in this action. Respondent shall also reimburse Complainant in the amount of $3660.00 for travel costs incurred due to the illegal layoff. Respondent's motion for attorney fees and costs is denied.

DATED this ____day of
September, 2004, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1420
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of

the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is $50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.
Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the____ day of **September, 2004,** I placed true copies of the foregoing **INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage

prepaid, addressed as follows:

William S. Finger
Frank & Finger, P.C.
P.O. Box 1477
Evergreen, Colorado 80437-1477

And in the interagency mail to:

Jill M. M. Gallet
First Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods